BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

GROUP PIER AMENDMENTS	**)**	**Administrative Cause**
FOR PUBLIC FRESHWATER LAKES	**)**	**Number: 04-025W**
(312 IAC 11)	**)**	**(LSA #04-94(F))**

INTRODUCTION, REPORT OF PUBLIC HEARING AND SUBSEQUENT COMMENTS, AND ANALYSIS, AND RECOMMENDATIONS FOR FINAL ADOPTION

1. INTRODUCTION, REPORT OF PUBLIC HEARING AND SUBSEQUENT COMMENTS, AND ANALYSIS

A. Introduction

The Steuben County Lakes Council, Inc. organized an informal meeting that was held in Angola on January 12, 2004 to consider issues pertaining to the management of piers on public freshwater lakes. Participants included representatives of the Steuben County Commissioners, the Steuben County Plan Commission, and the Steuben County Surveyor. Also participating were representatives of the Division of Law Enforcement and the Division of Water from the Department of Natural Resources, and the Division of Hearings from the Natural Resources Commission.

The meeting sought ways to improve coordination of local and state functions pertaining to the management of construction activities along public freshwater lakes in Steuben County. As the discussions progressed, there were suggestions that many of the concerns from Steuben County had application to other counties along the northern tiers of counties where there are numerous public freshwater lakes.

One of several prominent topics discussed during the meeting was the concept of "funneling" where multiple off-lake properties or citizens have lake-access along a relatively narrow shoreline. Funneling can arise from a multitude of real estate arrangements, including subdivisions and condominiums. These real estate arrangements are sometimes serviced by multi-user or "group piers". Funneling can present challenges to planning where a consequence is the development of new or expanded group piers.

The current Natural Resources Commission rules pertaining to pier placement were discussed during the Angola meeting. These rules provide that qualified temporary piers are authorized by a general license. If a pier meets the standards described for a general license, the person who places the pier is not required to complete the full licensure application and review process. If a person places a pier that pier is authorized by the general license, review of the placement only occurs where a person files a request for administrative review with the Commission to initiate an adjudication. "Group piers" are not, as such, disqualified from a general license.

During the Angola meeting, there were suggestions that "group piers" should undergo review before placement. In other words, "group piers" should not qualify for a general license. Many group piers currently meet the standards for a general license.

Following the Angola meeting, the Department of Natural Resources drafted a rule proposal to disqualify "group piers" from placement under a general license. In early March 2004, the draft was distributed to the Steuben County Commissioners, the Steuben County Plan Commission, the Indiana Lakes Management Society, the Lake Maxinkuckee Envrionmental Council, the Steuben Lakes Council, the Tippecanoe Environmental Lake and Watershed Foundation, the Wawasee Property Owners Association, the Wawasee Area Conservancy Foundation, and several state legislators for input.

Modifications to the draft were made based upon this early input. The proposed "group pier" amendments were then presented to and discussed by a joint meeting of the Advisory Councils held on April 22, 2004. According to the "minutes" of the meeting:

> George Bowman, Assistant Director of the Division of Water, presented the item. He explained that the condominiums are installing large piers in "very small areas", and the current practice is, after following a minimum of guidelines, a pier would follow under a general license." Bowman noted that the DNR is receiving "a lot of public outcry." He explained that the rule proposal defined "group piers" and would require a person seeking a "group pier" to apply for a license within the full licensure process rather than through a general license. Bowman noted that the application process would allow for public comment. Paul Ehret, DNR Deputy Director, said the rule proposal was "not retroactive" to existing group piers, and, if adopted, it could become effective January 1, 2005.
>
> Donald VanMeter moved to recommend Commission approval of amendments to 312 IAC 11-2 and 312 IAC 11-3 regarding group piers. Ellen Jacquart seconded the motion. Upon a voice vote, the motion carried.

Following the recommendation by the joint meeting of the Advisory Councils, the Natural Resources Commission considered the proposal for preliminary adoption during a meeting held on May 18, 2004 at Indiana Dunes State Park in Porter County:

> George Bowman…said for consideration was a recommendation for preliminary adoption of a rule amendment that would disqualify "group piers" from a general license under the Lakes Preservation Act. The concept was intended to be an initial stage in responding to concerns from the Steuben County Commissioners, the Steuben County Plan Commission, and the Steuben Lakes Council expressed with respect to "funneling". Where "funneling" occurs, dense residential development near the shoreline of a "public freshwater lake" results in high-density use of the lake for boating. Challenges are presented to navigational safety and to environmental protection.
>
> Bowman said the current proposal would not prohibit the placement of a "group pier" within a public freshwater lake, but it would require that the managers of a group pier complete a review process with analysis by the DNR and notice to neighbors. He said the Division of Water shared the proposed language with several interested persons, and the Division now recommended the proposal for preliminary adoption.
>
> Peter Hippensteel, Ph.D., spoke in favor of the rule proposal. He said he had helped bring the DNR and local officials together for a March 11 meeting at Tri-State University, Angola, to discuss the challenges facing development near Indiana's inland lakes. He was encouraged that progress was being made. "I want to compliment the DNR and the NRC on its progress with this rule."
>
> Hippensteel expressed concerns that the term "condominium" in the proposed definition of "group piers" might not cover every form of dense residential development that would be promoted. John Davis suggested that reference might more generically be made to the "Horizontal Property" law. John Goss

suggested the DNR seek Linda Runkle's special expertise relative to zoning in addressing this aspect of the issue.

Hippensteel said he hoped the rule proposal given preliminary adoption would go beyond the current language proposal. He distributed suggested additional criteria pertaining to group piers:

- There should be a limit on the area covered by the pier related to the length of shoreline of the riparian owners. This area should include laterals and shore stations.
- Limits should be placed on the amount of wetland alterations, since both mechanical and chemical damage is associated with pier use.
- The pier placement needs to be consistent with shoreline zoning.
- The cumulative impacts on fishing, boating, swimming and the ecology of the lake must be considered. These large piers alter the public's use of the lake.
- The license should have an expiration or renewal date.

Chairman Kiley thanked Hippensteel for his continuing support and his insights into what was rapidly becoming one of the DNR's and the NRC's foremost issues. He asked that the additional concepts offered by Hippensteel be considered by the DNR agency professionals as the process moves forward. Other rule adoption would undoubtedly be required, but an important immediate step would be to begin treating "group pier" placement, under the Lakes Preservation Act, as a site-specific license rather than a general license.

John Goss said the Lakes Management Workgroup was being reconstituted this summer. The DNR would urge the group to focus upon challenges to the public trust for our inland lakes that are caused by riparian disputes, including those pertaining to funneling. He said Dr.Hippensteel's comments were directly on point.

Raymond McCormick said the joint meeting of the Advisory Councils considered this rule proposal. The Council members voted to recommended preliminary adoption of the "group pier"amendments by the Commission.

Jerry Miller moved to give preliminary adoption to the amendments to rules, as proposed by the Division of Water, to establish a definition for "group piers" and to require a site-specific license application be made for each new "group pier". McCormick seconded the motion. Upon a voice vote, the motion carried.

A "notice of intent" to adopt the rules was published in the Indiana REGISTER on May 1, 2004. On July 8, the Indiana State Budget Agency gave approval to a fiscal analysis of the impact of the amendments on state government.

Language given preliminary adoption and a notice of public hearing were published in the Indiana REGISTER on September 1, 2004. On the same day, a notice of public hearing was published in the Indianapolis DAILY STAR, a newspaper of general circulation

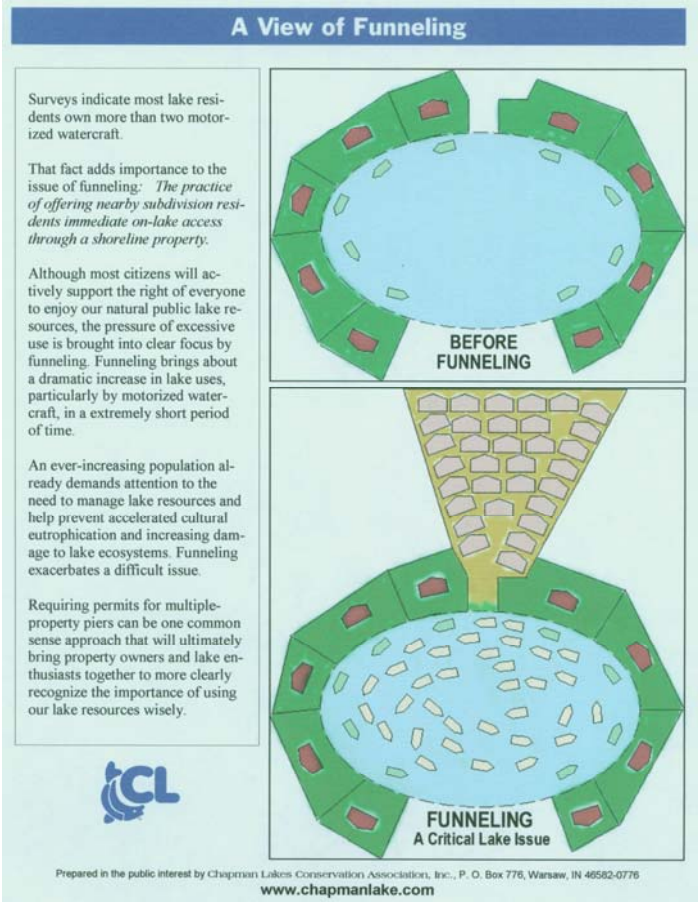
published in Marion County, Indiana. Notice of the public hearing and an overview of the rule proposal were included on the Commission's online calendar. On September 23, 2004, the Department of Natural Resources circulated a press release concerning the proposed amendments and indicating the time and place of the public hearing

B. Report of Public Hearing and Subsequent Comments

The public hearing was conducted in Warsaw, as scheduled, on October 4, 2004. Approximately 45 members of the public attended the hearing, several of whom offered comments on the proposal. The public comment period was held open until October 15, 2004, and additional comments were also received during this time period. The comments at and during the subsequent comment period are summarized below:

(1) Comments at Public Hearing

Dan Lee of the Chapman Lakes Conservation Association, Inc. stated the proposed pier rules were "only a first step to addressing funneling." In addition to the kinds of legal entities referenced in the proposal, family groups can have large numbers of boats that adversely affect enjoyment of the lake by others. "We think funneling is the issue." He said, with this rule adoption, the state is beginning to address its responsibilities. Now, the counties also need to move forward. "It is important and something we have to address." The Association provided "A View of Funneling" as follows:



Betty A. Busch of the Dewart Lake Protective Association said she agreed with the comments by Dan Lee. She said many lakeside property owners were now grandparents, and they may have numerous grandchildren whose boats are moored at a pier. Although not a "group pier" within the proposed definition, the effect is the same. "That in time is going to have to be addressed." There should be a limit to "how many Ts a person can put on a particular pier."

Dave Tyler spoke as Director of the Tippecanoe Environmental Lake and Watershed Foundation. He said his association was "very much in favor of these amendments." He also provided a written statement that indicated in substantive part:

1) The proposed Indiana Department of Natural Resources rule changes under 312 IAC 11 that would define and limit "Group Piers" appears to be an excellent improvement in the code enforcement procedures. This new rule would require, for the first time, that Group Piers, as defined by IDNR rule, that are planned for construction in Indiana's Public Freshwater Lakes shall be constructed only after prior Public Notice and IDNR review and approval. It will tend to reduce the abusing "Taking of the Lake" that occurs when non-riparians overcrowd limited lakeshore space as well as help to preserve the natural scenic beauty of the existing lakeshore.
2) Will an approved Group Pier, under the proposed new rules and administrative procedures, be considered a temporary or a permanent pier?

(A) If it is a temporary pier, in the same manner as piers authorized under 312 IAC 6-2-14 "General License" provisions, then it must require "new" application and approval prior to each seasonal construction/installation.
(B) If it is a permanent pier, then, according to the Division of Water Permit Manual, "…permanent piers are viewed by the Department as a taking of the lakebed and are, therefor, contrary to the fundamental tenets of the Lakes Preservation Act."

3) The currently required IDNR Permit Application Form 42946 and procedures (Under IC 14-26-2), Lakes Preservation Act) require public notice by the applicant to only adjoining property owners. Since a "Group Pier" impacts more than the few adjoining property owners, on both sides of the shoreline, we suggest an expanded public notice requirement, rule or procedure by the applicant to include all surrounding property owners within two miles of the intended "Group Pier" site.
4) The proposed "Group Pier" rule defines a group as "At least Five (5)…" We think that the dictionary definition of "two or more" is a but restrictive but that five is too many. For the purpose of this proposed rule, "At least Three (3)…" would be much more reasonable.

In an October 7, 2004 letter, Tyler replaced these initial comments as Director of the Tippecanoe Environmental Lake & Watershed Association. The letter is included among "Subsequent Comments".

Bob Smith said he was also a member of the Tippecanoe Environmental Lake and Watershed Foundation. He expressed agreement with the comments by Dave Tyler.

Robert W. Payton said he was a property owner on Lake Tippecanoe. He was concerned the rule proposal would create "a whole lot more paperwork and bureaucracy in order to do business."

Dave McCayman said, "I applaud your efforts to define 'group piers'". Considering the consequences "group piers" can have on neighboring owners, requiring a prior permit is not unreasonable. He said he was, however, concerned with the consequence of having existing piers "grandfathered".

Jack Dold, President of the LaGrange County Lakes Council, indicated his association represents 60 lakes in the county. He submitted written comments and read them into the record:

> The LaGrange County Lakes Council was formed with the purpose: To promote, protect and preserve the quality of the lakes and watersheds in LaGrange County.
>
> Our Council represents more than 60 lakes in LaGrange County and it is our desire to encourage the passage of the proposed DNR rule concerning the construction of "group piers" on Indiana lakes.
>
> We believe that this rule will greatly reduce the impact of "funneling" which can be detrimental to the health of any lake.

> The citizens of Indiana stand to benefit from rulemaking that is intended to protect their waters from excessive pressure brought on by increasing residential development on and near Indiana's lakes.
>
> It is not uncommon, on any given day, to find more active watercraft being launched from our public access sites than from riparian homeowners, especially on some of our smaller lakes. This is evidence of the popularity and success of public access. We believe that without some measure of protection from over-development, public interests for lake access may be jeopardized.
>
> We sincerely appreciate the efforts of the Department of Natural Resources to address this issue. We believe that their cooperation, in conjunction with local zoning efforts, will allow our citizens to preserve the quality of our lakes, not only for the present but also for future generations.

Ron Matthews spoke as President of the Steuben County Lakes Council. He said his council urged the Commission to move forward with the rule proposal.

Matthews also spoke as an individual and a property owner along Ball Lake. He said, "Every lake should have a boat ramp." Matthews suggested boat owners pay a fee to support good lakes management, but there is not a similar fee for riparian owners, and there needs to be.

Paul R. Oakes said he "backed" the comments by Ron Matthews. As has been demonstrated through studies, the value of the lakes to Steuben County is ""very significant". While he understood the great attraction of the lakes, if rules are not adopted that are directed to "group piers", we "could kill the golden goose".

Richard Bussard spoke on behalf of the Lime Lake and Lake Gage Association. He said his association supported the rule proposal. Also, he reflected that "nothing stops a person from renting spaces under the table." He said this activity should be prohibited.

R. Joe Roach of the Shafer and Freeman Lakes Environmental Conservation Corporation said his organization supported the Commission "continuing the process". He said the "group pier" proposal was a "first step" to look at the important issues facing the state's lakes.

Jan Conwell, President of the Shafer and Freeman Lakes Environmental Conservation Corporation, "commended the DNR for being proactive" with the rule proposal. We believed it's a "move in the right direction".

Bill and Beverly Long stated they have operated a campground for 40 years. They place multiple piers to serve their customers. They expressed opposition to the rule proposal, reflecting that "It's just another permit we're going to have to get."

Don Norris serves the Hamilton Plan Commission for Hamilton Lake. He said he was interested in addressing funneling as a zoning issue. He asked whether the Commission rules provide a density restriction pertaining to piers and lake-usage by boaters.

The response was that 312 IAC 11 does not directly address either pier or boat density. Density could be a navigation safety concern at a particular location, however, and the Department's Division of Law Enforcement would consider safety when evaluating a license application for a pier.

Corky Van indicated he was a member of the Steuben County Lakes Association and the Lakes James Association, Inc. "I agree strongly with what Ron Matthews said." How can you rent slips on waters of a public freshwater lake when "you don't own" those waters? He said he appreciated the proposed rule amendments as a step toward controlling funneling.

John Turner of Syracuse Lake said, "I'm in agreement with the comments concerning funneling." He expressed concerns that "group piers are causing environmental degradation." Rules should be adopted to help protect the integrity of the lakes. Turner said the problem was not limited to piers placed by condominiums and other associations. Private landowners with multiple slips can pose the same problem. He suggested that there should be consideration for limiting the number of watercraft based upon the amount of lake-frontage. Turner said the appeals process to the Natural Resources Commission needs to be simplified. Parties should not have to employ attorneys to represent their interests.

Mike Lattimer of the Tippecanoe Environmental Lake & Watershed Foundation said, "I'm in favor of the group pier amendments."

Steve Snyder, an attorney from Syracuse, asked whether the riparian owner or the DNR would have the responsibility for asserting a lawful nonconforming use was a nuisance or posed a safety hazard. The hearing officer responded that he anticipated the contention would typically be raised by the agency, although he could not speak for the DNR. Snyder asked who would have the burden of proof. The hearing officer responded that, since he could not recall a Commission proceeding where the point was adjudicated, he thought he should reserve judgment.

Snyder asked whether the underlying policy goal of the proposed rule amendments was to reduce shoreline clutter or to reduce boat traffic on the lakes. The hearing officer responded that his perspective was the goal of the amendments was to cause an evaluation of new "group piers" before placement rather than after placement.

J. Nathan Noland, a cottage owner on Lake James, spoke as President of the Glen Eyre Association. He said the members of the association were concerned with maintaining the integrity of Lake James and all public freshwater lakes and that it supported the concept of regulating group piers. The association believes that "funneling" presents challenges that require special attention.

Speaking as an individual, Noland said he was concerned with whether there was sufficient statutory authority for the Commission to adopt rules governing temporary piers. He said the Lakes Preservation Act makes no direct reference to piers. Noland indicated he believed the illustrations of what constitutes a "group pier" should be better refined. In addition, Noland reflected that there needed to be better clarity for how the agency would address lawful nonconforming uses, or what is sometimes called "grandfathering". He said the continuation of lawful conforming uses was supportable, but those uses should not expand beyond actual usage when the rule becomes effective.

Noland supplemented his oral comments with an email on October 10, 2004. The email is included among "Subsequent Comments".

Bill Schmidt of Lake James reflected that the proposed rules would not prevent funneling. He said state rules and county ordinances should be coordinated so that, if a project violates a county ordinance, the Department of Natural Resources would not issue a license. In this manner, funneling could be controlled.

John Urbahns of Freemont said he supported the "group pier" amendments as written. At the same time, he noted that the "DNR is quick to point out its jurisdiction ends at the shoreline", yet the agency regulates the placement of dry hydrants. Urbahns wondered if there might be an inconsistency.

Tom Hazelett of Lake James said he liked the proposed definition for a "group pier". In addition, he said a pier should not be licensed by the DNR if it violates local zoning.

Bill Mansfield of Decatur said, "I fully support addressing funneling." He also observed that many temporary piers are supported by auger posts, and those posts fit into sockets in the lakebed. The sockets are permanent. He asked how, then, these piers qualified as temporary structures.

James Hebenstreit, Assistant Director for the Department's Division of Water, responded that permanent sockets would be permanent structures and would require a site-specific permit. In other words, they would not qualify for a general license.

Gayl Doster of Lake James said he was concerned with the lack of coordination between the Department of Natural Resources and local zoning authorities.

Mark Sanborn spoke as Steuben County Plan Director. He suggested that if ordinances are in place that would address funneling, those could be considered by the DNR in its licensure processes under the Lakes Preservation Act.

James Hebenstreit responded that when the DNR's Division of Water issues a license, the licenses states it does not relieve an applicant from obtaining any needed licenses from federal, state, or local government. He doubted, however, that the current statutory

structure would allow the Department to make approval of a Lakes Preservation Act license contingent upon obtaining local zoning approval.

Sanborn supplemented his comments at public hearing with an email received on October 7. The email is included among "Subsequent Comments".

Michael Brower of Syracuse observed that funneling is an old concept. For his property, funneling has existed by deed for 70 years and by the terms of a court order for 20 years. He said the Department's permitting process is too hard. Brower said he had never previously heard that permanent sockets would require a DNR permit. "The public should be told." He said a complete site-specific license from the Department should be required for all piers, not just group piers.

(2) Subsequent Comments

Susan Anderson of Pretty Lake sent an email on October 5:

> As a lake resident concerned with the potential for increased pressure on Indiana's lakes as a result of group piers, I am in agreement with the proposed changes to the permitting process that will require a DNR permit before a new group pier can be installed.

Tim Conley wrote in an email received on October 14, 2004:

> . . . . I am president of Lendonway Terrace Property Owners Association. We are an established neighborhood and have a commons ground on Dewart Lake with two piers on it in Kosciusko County. I am wondering how is this going to affect us? Would we be grandfathered in? Would this be a one time permit or a yearly requirement? Also we are looking at adding on pier spaces as members buy into the piers as we still have some space left within the 150 ft limit. Would we have to get a permit each time we added on or made improvements? Personally I am a marine mechanic by trade and work on Lake Wawasee. I don't see how you can just focus on the group pier issue a lot of these people are local and support the area with taxes. What about the people that trailer and fill the ramps every weekend? I really think that safety should be the big issue. More than once I have seen a new boat owner buy a boat that is too big for his first boat and lacts the expertise to drive it. We are required to go thru Driver' Ed. before we get a drivers license and pilots need to learn how to fly a plane and then get a license. Why do we turn people loose in a boat that is very difficult to navigate in tight situations without any boat driving experience except for maybe a dryland safety course which most of our kids have gone thru? I really think we should have beginners permits for boating and pass a drivers test and then get a boating liscense and then follow the rules of the road!(waterways)

J. Nathan Noland sent an email dated October 10, 2004. The email states in substantive part:

I own a cottage on Lake James and currently serve as President of the Glen Eyre Association. Members of our association are all concerned with the expansion of development "funneling" property owners to "group piers" on Lake James, as well as all our freshwater lakes. However, the following comments are mine alone and they have not been shared with our Board of Directors or general membership.

As I indicated in my oral comments at the October 4, 2004 public hearing I am concerned that statutory authorization to promulgate "group pier" rules is unclear at best. My cursory review of IC 14-26-2 (Lake Preservation Act) and IC 14-15-7 (Powers and Duties of the Department) do not grant rulemaking authority for regulation of "group piers". There are references to licensing of "temporary or permanent" structures under the Lake Preservation Act, but specific reference to piers is not apparent. As I stated before the Natural Resource Study Committee and the Public Hearing on these proposed rules, I urge the Department to ask the General Assembly for specific authority to regulate "group piers". Failure to do so may subject any final rule to unnecessary legal challenge.

Secondly, as I also testified at the Public Hearing, any licensing of "group piers" should be prospective only and not required for any existing pier that has been utilized for the docking of watercraft prior to final adoption of these rules. I stress any pier that has been installed and <u>utilized</u> should be exempt from future licensing, unless the pier is expanded beyond current use. The purpose of the proposed rule is to regulate prospective development and the department should concentrate on regulating future installation of "group piers". To require licensing of any existing piers would put the department and current property owners under unnecessary burdens.

As an example, our Association does (and has for many years) maintain a "community dock" that may be utilized by 3 to 6 or 7 watercraft throughout the summer months. This dock does not extend into the waters any more than neighboring private piers and has no extension sections attached for extra watercraft docking. However, under the definition of "group pier" in the proposed rule, we may be subjected to an unnecessary license in the future. At the public hearing it was stated that these proposed rules would not apply to any existing structure, but the rule as written does not make that clear. I urge the addition of a "grandfather" provision stating that the licensure of existing "group piers" (again I want to stress existing and <u>utilized</u>) is not required.

Finally, I am bothered by the proposed definition of "group pier" at 312 IAC 11-2-11.5 because I do not think it addresses the real problem, which is density of watercraft on piers extending into our freshwater lakes. For example, you could have a pier under the proposed definition, providing docking space for four (4) separate property owners with three (3) watercraft each, on a pier with no licensing requirement. That pier would have a total of twelve (12) different watercraft docked at that pier with no licensing requirement. At the same time, you could have a pier at a campground for the docking of four (4) watercraft that would require a license under the proposed rule. An association, like the one I am a member of, might be required to obtain a license for a pier that only facilitates six (6) watercraft. I think a better way to define a "group pier" is any

> pier that can facilitate more than a specific number of watercraft, regardless of ownership of the pier.
>
> Thank you for the opportunity to comment.

Emphasis supplied by J. Nathan Noland.

Mark Sanborn, Steuben County Plan Director, wrote in an email dated October 7:

> Thank you for taking the time to read these comments concerning the proposed rule changes for Group Pier definitions (312 IAC 11-2-11.5).
>
> As I understand the scope of this proposed change, petitioners would need to apply for a "group pier" permit when they meet the new definition, allowing for a public hearing prior to approval.
>
> It is Steuben County's position that the criteria for determination as to whether the "group pier" is approved include local zoning. We would conclude that these Department of Natural Resource Commission's public hearings allow input from the local Zoning Administrator concerning local zoning. According to the Steuben County Zoning Ordinance all petitioners for a "group pier" would need to apply for a Special Exception from the Steuben County Board of Zoning Appeals to allow any pier with more than eight (8) docking spaces. Please consider this change to the list of criteria in your final draft.

Donald R. Smith of Pretty Lake sent an email on October 5:

> As a lake resident concerned with the potential for increased pressure on Indiana's lakes as a result of group piers, I am in agreement with the proposed changes to the permitting process that will require a DNR permit before a new group pier can be installed.

Dave Tyler wrote on October 7, 2004 as Director of the Tippecanoe Environmental Lake & Watershed Foundation:

> (1) The proposed Indiana Department of Natural Resources rule change under 312 IAC 11 that would define and limit "Group Piers" appears to be an excellent improvement in the code enforcement procedures. This new rule would require, for the first time, that Group Piers, as defined by IDNR rule, that are planned for construction in Indiana's Public Freshwater Lakes shall be constructed only after prior Public Notice and IDNR review and licensure. It will tend to reduce abusive "Taking of the Lake" that occurs when non-riparians overcrowd limited lakeshore space as well as help to preserve the natural beauty of existing lakeshore.
> (2) It is important to consider whether an approved Group Pier, under the proposed new rules and administrative procedures, will be considered by IDNR to be a **temporary** or a **permanent** structure.
> A) If a licensed Group Pier is considered as temporary, in the same manner as piers qualifying under 312 IAC 11-3-1 "General License" provisions, and if the installed Group Pier is ever subsequently removed (i.e.

seasonally) from the lake, then it would logically follow that any future replacement of that Group Pier would require a "new" permit application and license.

B) If a Group Pier application is considered to be for a permanent structure then, it can not be approved based on the Division of Water's position, as stated in their Permit Manuel, "…permanent piers are viewed by the Department as a taking of the lakebed and are, therefor, contrary to the fundamental tenets of the Lakes Preservation Act."

C) The resolution of the contradiction in A & B above might well be resolved with an additional Rule under 312 IAC 11-4-X Group Piers. Such new rule should preserve the piers and be balanced by the considerable administrative burden of an annual Permit Application. We suggest that a Group Pier License should be time limited to 36 consecutive months from the date of issue.

(3) The currently required IDNR Permit Application Form 42946 and procedures (Under IC 14-26-2 Lakes Preservation Act) require public notice by the applicant only to adjoining property owners. Since a "Group Pier" impacts more than the few adjoining property owners, on both sides of the shoreline, we suggest an expanded public notice requirement, rule or procedure responsibility on the applicant to include notice to all surrounding property owners, within two miles (10,000 Ft.) of the intended "Group Pier" site. We believe an additional Rule under 312 IAC 11-4-X Group Piers is appropriate for this purpose.

(4) The proposed "Group Pier" rule defines a group as "At Least Five (5)…" We think that the dictionary definition of "Group = two or more" is a bit restrictive but that five is too many. For the purpose of this proposed rule, "At Least Three (3)…" would be much more reasonable.

Emphasis provided by Dave Tyler.

(3) Analysis

Any effort to regulate construction activities, along or within Indiana's public freshwater lakes, energizes agency and citizen concerns for how difficult it is to balance legitimate interests. These concerns are expressed in the public hearing process through comments, some of which are directed to the immediate rule proposal, and others of which are angled toward matters that are considered elsewhere or that have not yet been adequately addressed.

The current rule proposal is relatively modest in scope. If adopted, structures identified as "group piers" would be disqualified from the general license granted by the Natural Resources Commission for the placement of most temporary piers within public freshwater lakes.

The consequence of the proposal is that a person wishing to place a "group pier" would, before placing the structure, be required to successfully complete a site-specific license application with the Department of Natural Resources. Completion of the application would entail the preparation of drawings to describe the pier. The Department would review the application for conformance with the requirements of the Lakes Preservation Act. Considerations would include impacts upon biological and zoological resources, navigation, public safety, correlative interests of other riparians and easement holders, and the public trust. Affected interested persons would be notified of the application and have opportunities to participate in its review.

Currently, a "group pier" may be placed under the auspices of a general license. The Department or an aggrieved person may seek review of placement, but the request is made after-the-fact. Shortly after a new group pier is placed, the legal contest is likely to begin.

This analysis seeks to address several important issues that have been raised by citizen comments. A conscious decision was made to attempt responsiveness rather than to discount concerns that might not, in a legal sense, be germane. In considering the analysis, however, it is important to note that some of the citizen comments do and some do not bear directly upon the immediate rule proposal.

Comments are grouped by category. Those categories are considered as follows:

(A) Statutory Authority

Nat Noland expressed concerns that the Lakes Preservation Act (IC 14-26-2) does not specifically consider "piers". He outlined this concern during the public hearing in Warsaw then memorialized it in subsequent written comments:

> I am concerned that statutory authorization to promulgate "group pier" rules is unclear at best. My cursory review of IC 14-26-2 (Lake Preservation Act) and IC 14-15-7 (Powers and Duties of the Department) do not grant rulemaking authority for regulation of "group piers". There are references to licensing of "temporary or permanent" structures under the Lake Preservation Act, but

> specific reference to piers is not apparent. As I stated before the Natural Resource Study Committee and the Public Hearing on these proposed rules, I urge the Department to ask the General Assembly for specific authority to regulate "group piers". Failure to do so may subject any final rule to unnecessary legal challenge.

This comment raises a fundamental threshold question as to the regulatory authority of the Department of Natural Resources (and, on administrative review, the Natural Resources Commission) to address piers and similar structures within public freshwater lakes. A direct statutory listing, of the kinds of improvements that constitute a "temporary or permanent" structure, would enhance public understanding. Noland's call for legislative clarification is well considered. The recommendation is for the Commission to urge the Department of Natural Resources to support this effort.

Even so, the unique legislative history of the Lakes Preservation Act, and particularly of the relatively recent enactment of IC 14-26-2-23, is believed to provide clear support for the regulation of temporary piers. This support applies both generally and within the context of the immediate rule adoption. This history has been discussed previously with the Natural Resources Commission[1] but warrants repeating.

The origins of the Lakes Preservation Act began with legislation enacted in 1947, but the statutory chapter has been amended on numerous occasions since. On October 16, 1997, the Court of Appeals of Indiana rendered an important decision in *Ind. Dept. of Natural Resources v. Town of Syracuse*, 686 N.E.2d 410. The Court concluded the Department of Natural Resources did not have statutory authority to regulate temporary piers--at least not those supported merely by auger poles:

> The portion of IC 13-2-11.1-5 [now IC 14-26-2-9] relied upon by the DNR provides: "Upon application by the owner of land abutting a public freshwater lake, the department may issue a permit to change the shoreline or alter the bed of a public freshwater lake after investigating the merits of a written application. . . ." "Alter" is not defined. The DNR urges the adoption of a dictionary definition of alter: specifically, to change or modify. . . .

[1] The Commission has adopted a nonrule policy document that references this history. See Information Bulletin #41, "The Public Trust Doctrine on Navigable Waters and Public Freshwater Lakes", 27 IND. REG. 2109 (March 1, 2004) and republished on the Commission's website at http://www.in.gov/nrc/policy/

> We decline the DNR's invitation to attribute such a broad, generic, dictionary reading to the statute, preferring instead to ascertain the meaning of "alter" as used within the Act. We are not concerned with the definition of alter in the general sense; rather , our task is to ascertain its intended meaning within the context of the Lake Preservation Act. [Citations omitted.] (Court is not to view statute in isolation, but must ascertain its effect by viewing it in context of entire Act.)
>
> A review of the Lake Preservation Act reveals that the legislature was contemplating the regulation of activities of a more violent and substantial nature than securing three-and-a-half inch posts two to three feet into a lake bed. . . .

Before the *Town of Syracuse* decision, the Natural Resources Commission had adopted rules pertaining to the regulation of temporary piers. The Department of Natural Resources had enforced the rules. In response to the *Town of Syracuse* decision, the Department ceased, or at least significantly curtailed, enforcement activities.

Also in 1997, the Indiana General Assembly enacted legislation (Ind. P.L. 239-1997) to form the Indiana Lakes Management Work Group. The work group included 26 members chosen from a broad base of lakes organizations, users, and researchers. Also included were Senator Robert Meeks (R-LaGrange), Senator Katie Wolf (D-Monticello), State Representative Dennis Kruse (R-Auburn), and State Representative Claire Leuck (D-Fowler). The work group was directed to do the following:

1. Conduct public meetings to hear testimony and receive written comments concerning problems affecting the lakes of Indiana.
2. Develop proposed solutions to problems affecting the lakes of Indiana.
3. Issue reports to the Natural Resources Study Committee of the Indiana General Assembly.
4. Issue an interim report before July 1, 1998 and a final report before December 31, 1999.

Upon completion of its proposed solutions, the work group was to make those solutions available in writing to the Natural Resources Study Committee, the Department of Natural Resources, and the public. The work group achieved its directive.

One of the subjects addressed by the work group (identified by the work group as "Category 21") was the *Town of Syracuse* decision. During its September 28, 1999 meeting, the work group approved the following issue and problem statement with respect to *Town of Syracuse*, and it offered recommendations:

> On October 16, 1997, the Court of Appeals ruled [in *Ind. Dept. of Natural Resources v. Town of Syracuse*] that the Indiana Department of Natural Resources (DNR) has no statutory authority under [the] Lakes Preservation Act to require permits for seasonal installation of piers or other structures that are of a temporary nature, so long as the installation method has minimal impact on the bed of the lake.
>
> Although there are other areas of law that suggest DNR has the authority to regulate temporary structures in public freshwater lakes, the authority is not definitive and is cumbersome to apply.
>
> The result of this condition of law is that DNR is unable to effectively manage public freshwater lakes in the full spirit of *public trust* as mandated by law. Additionally, the ability of public freshwater lakes, users, property owners, and local governments to resolve disputes short of expensive court battles is unrealistically limited.
>
> Structures that are considered temporary, and have *de minimis* impact on the lake bed are left to uncontrolled proliferation. The result is loss of public usage of areas within 150 feet of shore, an increase in riparian owner disputes, and environmental harm to the lakes.
>
> DNR has attempted to manage this problem through agency rule-making authority. This process has not adequately dealt with the problem, and clear authority must be re-established by the legislature to protect Indiana's public freshwater lakes for property owners, current users, and future stakeholders.
>
> The Indiana Lakes Management Work Group recommends that the Indiana General Assembly amend the public freshwater lake law to add a new section that reads as follows:
>
> > IC 14-26-2-5.5. The Commission shall adopt rules under IC 14-10-2-4 to assist in the administration of this chapter. The rules must, as a minimum, do the following:
> > (1) Provide objective standards for licensing the placement of any temporary or permanent structure or material, or the extraction of material, over, along, or within the shoreline or waterline. These standards shall exempt any class of activities from licensing where the Commission finds the class is unlikely to pose more than a minimal potential for harm to the public rights or public trust as described in IC 14-26-2-5.
> > (2) Establish a process under IC 4-21.5 for the mediation of a dispute among riparian owners, or by a riparian owner against the department, relative to the usage of an area over, along, or within the shoreline or waterline for a matter within the jurisdiction of this chapter. If after a good faith effort mediation under

> this subdivision fails to achieve a settlement, the department shall make a determination of the dispute. A person affected by the determination may seek administrative review by the Commission.

The Indiana General Assembly enacted legislation in 2000 and in 2003 to implement several of the work group's recommendations. Among these was P.L. 64-2000, SEC. 1, that sought to implement the recommendations set forth in Category 21. In language structurally differing from the work group's proposed IC 14-26-2-5.5, but substantively nearly identical, IC 14-26-2-23 was enacted:

> Sec. 23. The commission shall adopt rules in the manner provided in IC 14-10-2-4 to do the following:
> (1) Assist in the administration of this [Lakes Preservation Act] chapter.
> (2) Provide objective standards for licensing:
> (A) the placement of a temporary or permanent structure or material; or
> (B) the extraction of material;
> over, along, or within the shoreline or waterline. The standard shall exempt any class of activities from licensing if the
> commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.
> (3) Establish a process under IC 4-21.5 for the mediation of disputes among riparian owners or between a riparian owner and the department concerning usage of an area over, along, or within a shoreline or waterline for a matter within the jurisdiction of this chapter. The rule must provide that:
> (A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and
> (B) a person affected by the determination of the department may seek administrative review by the commission.

Section 23 was the progeny of the work group's concerns that the *Town of Syracuse* decision had compromised the Department's ability to regulate temporary structures (and, in the *Town of Syracuse* decision, those temporary structures were temporary piers).

The proposed "group pier" rules would be adopted under IC 14-26-2-23. They would be an appropriate exercise of the Commission's licensure authority in Section 23(2)(A) for the placement of a temporary structure, or, more particularly, a temporary pier.

(B) Lawful Nonconforming Uses

There were several comments that sought direction or offered perspectives as to how "group piers" would be addressed that existed before the effective date of a new rule.

This subject is sometimes described as "grandfathering" but probably better described as lawful nonconforming uses.

Dave McCayman suggested that considering the consequences "group piers" can have on neighboring owners, requiring a prior permit would not be unreasonable. He said he was concerned with the consequences of having existing piers "grandfathered".

Syracuse attorney, Stephen R. Snyder, asked whether the riparian owner or the DNR would have the responsibility for asserting a lawful nonconforming use was a nuisance or posed a safety hazard. The hearing officer responded that he anticipated the contention would typically be raised by the agency, although he could not speak for the DNR. Snyder asked who would have the burden of proof. The hearing officer responded that, since he could not recall a Commission proceeding where the point was adjudicated, he thought he should reserve judgment.

During the public hearing, J. Nathan Noland said the continuation of lawful conforming uses was supportable, but those uses should not expand beyond actual usage when the rule becomes effective. He supplemented his oral remarks with subsequent written comments:

> …[A]ny licensing of "group piers" should be prospective only and not required for any existing pier that has been utilized for the docking of watercraft prior to final adoption of these rules. I stress any pier that has been installed and utilized should be exempt from future licensing, unless the pier is expanded beyond current use. The purpose of the proposed rule is to regulate prospective development and the department should concentrate on regulating future installation of "group piers". To require licensing of any existing piers would put the department and current property owners under unnecessary burdens.
>
> As an example, our Association does (and has for many years) maintain a "community dock" that may be utilized by 3 to 6 or 7 watercraft throughout the summer months. This dock does not extend into the waters any more than neighboring private piers and has no extension sections attached for extra watercraft docking. However, under the definition of "group pier" in the proposed rule, we may be subjected to an unnecessary license in the future. At the public hearing it was stated that these proposed rules would not apply to any existing structure, but the rule as written does not make that clear. I urge the addition of a "grandfather" provision stating that the licensure of existing "group piers" (again I want to stress existing and utilized) is not required.

Tim Conley also wrote in an email concerning whether an existing pier would be "grandfathered". ". . . [W]e are looking at adding on pier spaces as members buy into the piers as we still have some space left within the 150 ft limit. Would we have to get a permit each time we added on or made improvements?

A subject pertaining to the matter lawful nonconforming uses is whether "group piers" are to be treated as temporary structures or permanent structures. As presented by Dave Tyler, Director of the Tippecanoe Environmental Lake and Watershed Foundation, in an October 7 letter.

> 2) It is important to consider whether an approved Group Pier, under the proposed new rules and administrative procedures, will be considered by IDNR to be a **temporary** or a **permanent** structure.
> A) If a licensed Group Pier is considered as temporary, in the same manner as piers qualifying under 312 IAC 11-3-1 "General License" provisions, and if the installed Group Pier is ever subsequently removed (i.e. seasonally) from the lake, then it would logically follow that any future replacement of that Group Pier would require a "new" permit application and license.
> B) If a Group Pier application is considered to be for a permanent structure then, it can not be approved based on the Division of Water's position, as stated in their Permit Manuel, "…permanent piers are viewed by the Department as a taking of the lakebed and are, therefor, contrary to the fundamental tenets of the Lakes Preservation Act."
> C) The resolution of the contradiction in A & B above might well be resolved with an additional Rule under 312 IAC 11-4-X Group Piers. Such new rule should preserve the piers and be balanced by the considerable administrative burden of an annual Permit Application. We suggest that a Group Pier License should be time limited to 36 consecutive months from the date of issue.

A response might best begin with the comments by Dave Tyler. A "group pier" could either be a temporary structure or a permanent structure. The answer rests in the construction of the "group pier". The proposed rule amendments are unnecessary, however, for a "group pier" that would be a permanent structure. As examples, a "group pier" constructed of concrete or one resting on steel sheet pilings would not today qualify for a general license.

The significance of the proposed rules is that they would disqualify any "group pier", and notably those that are temporary in nature, from the Commission's general license. A pier that would otherwise satisfy the requirements for a general license would, *per se*, no

longer qualify if fitting the definition of "group pier". For example, even if a group pier is "easily removable", a site-specific license would be required before placement.

The Commission rules already address lawful nonconforming uses for structures licensed under the Lakes Preservation Act. As provided in 312 IAC 11-5-2:

> Sec. 2. (a) A structure or facility that was lawfully placed before the effective date of a section of 312 IAC 11-3, 312 IAC 11-4, or this rule (including a structure or facility lawfully placed under a section of 310 IAC 6-2 before its repeal), which would be unlawful if placed after that date, is a lawful nonconforming use.
> (b) The director or the director's designee may order the removal of a lawful nonconforming use under subsection (a) if the structure or facility is either of the following:
> (1) A nuisance that adversely affects:
> (A) public safety;
> (B) natural resources;
> (C) natural scenic beauty; or
> (D) the water level of a public freshwater lake.
> (2) Modified in a manner for which a license is required under IC 14-26-2 or this rule.
> (c) An order issued under subsection (b) is controlled by IC 4-21.5-3-8 unless an emergency exists, in which event IC 4-21.5-4 may be applied.
> (d) Nothing in this rule affects the department's right to seek injunctive or other relief under IC 14-26 or another applicable law. *(Natural Resources Commission; 312 IAC 11-5-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2228; filed May 11, 2004, 9:00 a.m.: 27 IR 3065)*

This rule section was construed in *Brown and Zeller, et al. v. DNR*, 9 Caddnar 136 (2004)[2]:

> As applied to a rule, a nonconforming use is a use of the premises that legally existed before the effective date of the rule, and that is permitted to continue subsequent to the enactment of the rule despite the fact it does not conform to the rule. Providing for nonconforming uses in the context of rules is harmonious with the principle of construction that, absent strong and compelling reasons, rules are given only prospective application. *Mann v. State Dept. of Highways*, 541 N.E.2d 929, 936 (Ind. 1984).[3] The law does not generally favor a

[2] Caddnar is the official compilation of decisions rendered by the Natural Resources Commission or its administrative law judges under IC 4-21.5 (sometimes referred to as the "administrative orders and procedures act" or "AOPA"). As provided in IC 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Amendments made to AOPA in 1997 also require the Commission and its Administrative Law Judges to address agency precedents cited by the parties where, as here, a proceeding is governed by IC 14.

[3] Also noteworthy is that this rule proposal was conceptualized as having only prospective application. During consideration by the joint meeting of the Advisory Councils, Paul Ehret, a Deputy Director for the Department, said the rule proposal was "not retroactive" to existing group piers.

> nonconforming use because it detracts from the purpose of the rule, which is to confine certain classes of uses and structures to certain areas. *Kosciusko County Bd. of Zoning Appeals v. Smith*, 724 N.E.2d 279 (Ind. App. 2000); transfer denied 741 N.E.2d 1251. 27. The person who claims a legal nonconforming use has the burden of establishing the claim. When the lawful conforming use is established, the burden of termination of the use by abandonment or discontinuance rests on the governmental entity opposing the nonconforming use. *Town of Avon v. Harville*, 718 N.E.2d 1194 (Ind. App. 1999), rehearing denied, transfer denied 735 N.E.2d 233.
> . . . .
>
> Once a legal nonconforming use is established, the agency has the burden of proving a termination of the use by abandonment or discontinuance. *Jacobs v. Mishawaka Bd. of Zoning Appeals*, 395 N.E.2d 834, 182 Ind. App. 500 (Ind. App. 1975). The mere discontinuance of use is not sufficient to show abandonment. The proprietor of a nonconforming use must manifest an intention to abandon or discontinue. *Stuckman v. Kosciusko County Bd. of Zoning Appeals*, 506 N.E.2d 1079 (Ind. App. 1987). 31. . . . Temporary piers placed within public freshwater lakes may typically be removed in winter months, but this seasonal character constitutes neither discontinuance nor abandonment.

Reference to 312 IAC 11-5-2, the *Brown and Zeller* decision, and the precedents cited in *Brown and Zeller*, suggests that a temporary "group pier" can qualify as a lawful nonconforming use. The pier owner has the burden of proving the conditions of the usage. The pier owner must demonstrate specifics as to the timing, location, and configuration of actual usage. An expressed intention, a plan, or a symbolic gesture of intended usage does not qualify a structure as a lawful nonconforming use. A temporary pier (including one that is a "group pier") cannot be expanded or reconfigured after the effective date of a new or amended rule, except in conformance with the new or amended rule. The current rule proposal would require a site-specific license for a "group pier", so if the proposal were adopted, any addition to or reconfiguration of an existing group pier would require compliance with the site-specific licensure process. Once a person demonstrates a lawful nonforming use, the Department of Natural Resources would have the burden of proving the structure constitutes a "nuisance" if the Department determined that modification or removal of the structure was appropriate. Under the rule section, a pier would constitute a nuisance if it adversely affected public safety, natural resources, natural scenic beauty, or the water level of a public freshwater lake. Similarly, the Department would have the burden of proving discontinuance or abandonment of a pier

authorized as a lawful nonconforming use. Removal of a temporary pier during winter months would not typically constitute discontinuance or abandonment.

These principles deserve a more serious consideration, however, than the analysis in a hearing officer report. The recommendation is that a document be drafted within the Department of Natural Resources, then an opportunity provided for its public scrutiny and review. The document should be tendered, either as a proposed rule or as a nonrule policy document, for the possible imprimatur of the Natural Resources Commission. This process might also consider the related subject of whether a license for a group pier should have a definite or an indefinite duration.

(C) Coordination of State Rules and Local Ordinances

Mark Sanborn, Steuben County Plan Director, spoke during the public hearing and later wrote in an email:

> It is Steuben County's position that the criteria for determination as to whether the "group pier" is approved include local zoning. We would conclude that these Department of Natural Resource Commission's public hearings allow input from the local Zoning Administrator concerning local zoning. According to the Steuben County Zoning Ordinance all petitioners for a "group pier" would need to apply for a Special Exception from the Steuben County Board of Zoning Appeals to allow any pier with more than eight (8) docking spaces. Please consider this change to the list of criteria in your final draft.

Bill Schmidt urged state rules and county ordinances to be coordinated so that, if a project violates a county ordinance, the Department of Natural Resources would not issue a license. He said that in this manner, funneling could be controlled.

Gayl Doster said he was concerned with the lack of coordination between the Department of Natural Resources and local zoning authorities.

During the public hearing, James Hebenstreit, Assistant Director for the Department's Division of Water, responded to Sanborn's comments. He noted that when the DNR's Division of Water issues a license, the licenses states it does not relieve an applicant from obtaining any needed licenses from federal, state, or local government. Hebenstreit expressed doubts that the current statutory structure would allow the Department to make

approval of a Lakes Preservation Act license contingent upon obtaining local zoning approval.

In executing their responsibilities, the Department of Natural Resources and the Natural Resources Commission are governed by a basic legal principle. A state administrative agency has only the powers conferred on it by the Indiana General Assembly. Powers not within the agency's legislative grant of authority may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 615 N.E.2d 816, 819 (Ind. Tax Ct. 1995), *citing Fort Wayne Education Association, Inc. v. Aldrich*, 527 N.E.2d 201, 216 (Ind. Ct. App. 1988). The Department of Natural Resources is the licensing authority for the Lakes Preservation Act. The Commission writes rules to help implement this Act.

The Lakes Preservation Act serves a variety of functions intended to protect the integrity of the lakes and help assure their current and future recreational usage. County and municipal ordinances serve a multiplicity of regulatory purposes, including land-use planning. Legitimate governmental purposes pertaining to land-use planning would not, in all instances, advance the purposes of the Lakes Preservation Act.

The General Assembly further defines the regulatory relationships between local plan commissions and the Department of Natural Resources within the contexts of local land-use planning and the Lakes Preservation Act. A broad legal platform is established for the development of local ordinances through the Home Rule provisions of IC 36-1-3. A notable exception to this legal platform is that a local governmental entity does not have the "power to regulate conduct that is regulated by a state agency, except as expressly granted by statute." IC 36-1-3-8(a)(7). A state agency, the Department of Natural Resources, regulates activities in public freshwater lakes through the Lakes Preservation Act. The Department's statutory authority is bounded by the lake's "shoreline or water line".[4] These legislative

[4] John Urbahns observed that the "DNR is quick to point out its jurisdiction ends at the shoreline", yet the agency regulates the placement of dry hydrants. He wondered if there might be an inconsistency.

pronouncements help effectuate state and local regulatory programs that are effective while minimizing the likelihood of redundancies, or, worse yet, inconsistencies.

Possibly, a rule could be developed within the current statutory structure allowing the Department to make approval of a Lakes Preservation Act license contingent upon approval of a local ordinance. At a minimum, the ordinance would need to advance a purpose of the Lakes Preservation Act. Perhaps this result could be accomplished through the formulation of a model ordinance (or alternative model ordinances) that a local governmental entity could adopt but would not be obliged to adopt. Perhaps, instead, legislation would be needed to authorize this approach. In any event, the current regulatory structure does not authorize the Department to condition approval of a Lakes Preservation Act license upon approval of an ordinance. The Commission should consider directing the Department to review, in cooperation with representatives of local governments, the efficacy and legality of inter-connected licensure processes for activities along or near public freshwater lakes.

(D) Definition of "Group Pier"

The centerpiece of these proposed amendments is a new definition for "group pier" to be codified at 312 IAC 11-2-11.5. The proposed definition generated several comments.

Dan Lee said the proposed pier rules were "only a first step to addressing funneling." In addition to the kinds of legal entities referenced in the proposal, family groups can have large numbers of boats that adversely affect enjoyment of the lake by others.

Betty A. Busch said many lakeside property owners are now grandparents, and they may have numerous grandchildren whose boats are moored at the piers. Although not fitting within the proposed definition, in effect these persons have group piers. "That in time is

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The regulation of dry hydrants is believed to be consistent with the geographic limitations of the Lakes Preservation Act. The Department has jurisdiction because elements of a dry hydrant and its "in-lake accessories" are within the "shoreline or water line" of the lake.

going to have to be addressed." There should be a limit to "how many Ts a person can put on a particular pier."

John Turner expressed concerns that "group piers are causing environmental degradation." He said the problem was not, however, limited to piers placed by condominiums and other associations. Private landowners with multiple slips can pose the same problem. He suggested that there should be consideration for limiting the number of watercraft based upon the amount of lake-frontage.

J. Nathan Noland testified at public hearing then memorialized his thoughts in a subsequent email:

> . . . I am bothered by the proposed definition of "group pier" at 312 IAC 11-2-11.5 because I do not think it addresses the real problem, which is density of watercraft on piers extending into our freshwater lakes. For example, you could have a pier under the proposed definition, providing docking space for four (4) separate property owners with three (3) watercraft each, on a pier with no licensing requirement. That pier would have a total of twelve (12) different watercraft docked at that pier with no licensing requirement. At the same time, you could have a pier at a campground for the docking of four (4) watercraft that would require a license under the proposed rule. An association, like the one I am a member of, might be required to obtain a license for a pier that only facilitates six (6) watercraft. I think a better way to define a "group pier" is any pier that can facilitate more than a specific number of watercraft, regardless of ownership of the pier.

As reported previously, a genesis of this rule proposal was an expression of concern emanating from local governmental officials and citizens in Steuben County. At least one of the illustrations of a "group pier" that had caused local concerns was one that was placed on behalf of a condominium. Other examples were incorporated into the proposed definition as the rule concept advanced toward preliminary adoption. A legitimate and fundamental responsibility of government is to redress grievances of its citizens. This rule proposal is, then, an effort to respond to a grievance and one that is influenced by immediate local government and citizen concerns.

The comments offered at public hearing reflect a vision that regulating a pier's structure and usage may better address the challenge to equitable lake usage than would regulation based on the form of ownership. A single pier with ownership by one individual, but that

has multiple Ts and 20 slips filled with watercraft, may cause as much complexity for navigation and as much neighborhood concern as if owned by a condominium. Even so, a new condominium or mobile home park may cause sudden and dramatic changes to the shoreline of a community, either through a single complex pier structure or through multiple piers. Sudden and dramatic changes may be less likely through the actions of the riparian owner of a single-family dwelling.

The concerns raised by commentators are well reasoned. The definition of "group pier" is imperfect, particularly in its failure to include large complex piers in the ownership of an individual or individuals. Also, there are no doubt modest piers that would be placed by a subdivision, a campground, a condominium, or a similar entity that would not require site-specific review.

Yet the hearing officer cannot offer a perfect definition. The proposal is a rational response to a request for Commission action, and it is one that is supported by a majority of commentators. Experience with application of the "group pier" definition could help bring into focus specifics of how the definition should be improved. The Commission might choose to place a five-year limit on application of the definition to help assure its serious review, and possible refinement, in light of this experience. In any event, the proposed definition appears functional and appropriate for final adoption.

(E) Policy Considerations of Changing from a General License to a Site-Specific License

Most commentators expressed support for the proposed rule change, either to discourage "funneling" or to support a proactive review by the Department of Natural Resources for new "group piers" (instead of the exclusive and reactive review by the Commission and its Division of Hearings). Support was not unanimous, however, and differing viewpoints should properly be recognized.

Robert W. Payton expressed concerns the rule proposal would create "a whole lot more paperwork and bureaucracy in order to do business." Bill and Beverly Long said they have, for more than 40 years, placed multiple piers to serve their campground customers.

Expressing opposition to the rule proposal, they reflected, "It's just another permit we're going to have to get."[5]

Michael Brower of Syracuse expressed a very different viewpoint. He said a complete site-specific license from the Department should be required for all piers, not just group piers.

These comments go to the heart of the proposed rule change. The Natural Resources Commission's structure for the regulation of temporary piers might properly be described as "regulation light". Most piers qualify for a general license. The amendments would disqualify a new category, "group piers". Whether this adjustment to the regulatory structure is warranted, or whether it goes far enough, are policy questions. These policy questions are within the discretion of the Natural Resources Commission.

2. RECOMMENDATIONS FOR FINAL ADOPTION

The amendments to the rules governing the Lakes Preservation Act, to disqualify a "group pier" from the Commission's general license, are presented for final adoption as set forth in Exhibit A.

In addition, the following items are identified for the Commission's consideration and possible action:

(1) Within the rule given final adoption, a limitation to five years (or another suitable period specified by the Commission) for the definition of "group pier". This limitation would be accompanied by instructions to the Department of Natural Resources to evaluate and suggest any refinements to the definition, particularly as experience with the new definition supports those refinements.

(2) A resolution urging the Department of Natural Resources to seek statutory amendments to the Lakes Preservation Act, to support clarity and public

[5] As discussed previously in this report, "group piers" that were in actual usage before the effective date of

understanding, to the effect that the agency's jurisdiction over temporary structures includes jurisdiction over the placement of temporary piers.

(3) A resolution directing the Department of Natural Resources to prepare a draft document to articulate principles and policies pertaining to lawful nonconforming uses, particularly as the apply to temporary piers. This draft would also consider whether a license for a temporary structure, such as a marina or group pier, should have a definite or an indefinite duration. The process would include an opportunity for public review, before tender of the draft to the Commission, for its consideration as a rule or as a nonrule policy document.

(4) A resolution directing the Department of Natural Resources to prepare a position paper as to whether the agency has current statutory authority, under proper circumstances, to make approval of a Lakes Preservation Act license contingent upon local license approval. If the authority is found to exist, the paper shall identify a strategy for effectively and appropriately implementing the authority. This strategy may include the development, in cooperation with local officials, of a model ordinance. If the authority is found to be lacking, the paper shall identify proposed or conceptual language by which the statutory authority could be established.

Dated: October 20, 2004

Stephen L. Lucas
Hearing Officer

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the rule can qualify as a lawful nonconforming use.

Exhibit A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #04-94(F)

DIGEST

Adds 312 IAC 11-2-11.5 concerning a new definition for a "group pier" on a public freshwater lake. Amends 312 IAC 11-3-1 to disqualify a group pier from treatment as a general license and to require a person seeking to place a group pier to complete the license application procedures of IC 14-26-2 (sometimes referred to as the "Lakes Preservation Act"). Effective 30 days after filing with the secretary of state.

312 IAC 11-2-11.5
312 IAC 11-3-1

SECTION 1. 312 IAC 11-2-11.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 11-2-11.5 "Group pier" defined
Authority: IC 14-10-2-4; IC 14-26-2-23
Affected: IC 14-26-2

Sec. 11.5. "Group pier" means a pier that provides docking space for any of the following:
(1) At least five (5) separate property owners.
(2) At least five (5) rental units.
(3) An association.
(4) A condominium, cooperative, or other form of horizontal property.
(5) A subdivision or an addition.
(6) A conservancy district.
(7) A campground.
(8) A mobile home park.
(9) A yacht club.
(Natural Resources Commission; 312 IAC 11-2-11.5)

SECTION 2. 312 IAC 11-3-1, AS AMENDED AT 27 IR 3062, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

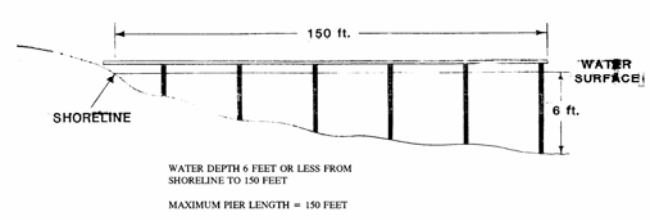
312 IAC 11-3-1 General licenses for qualified temporary structures; dry hydrants; glacial stone refaces
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-26-2

Sec. 1. (a) The placement and maintenance of a:
(1) temporary structure; ~~a~~
(2) dry hydrant; or ~~a~~
(3) glacial stone reface;
is authorized without a written license issued by the department under IC 14-26-2 and this rule if the temporary structure, dry hydrant, or glacial stone reface qualifies under this section.

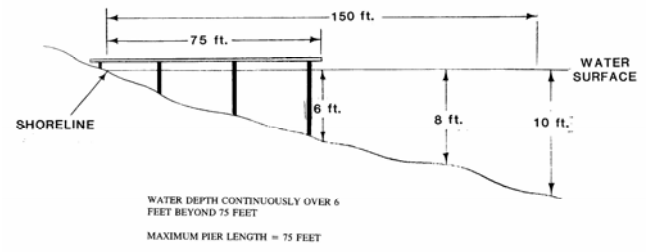
(b) In order for a temporary structure to qualify, the structure must satisfy each of the following:
(1) Be easily removable.

(2) Not infringe on the access of an adjacent landowner to the public freshwater lake.
(3) Not unduly restrict navigation.
(4) Not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake.
(5) Not extend more than one hundred fifty (150) feet from the legally established or average normal waterline or shoreline.
(6) If a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the legally established or average normal waterline or shoreline.
(7) Not be a marina.
(8) Not be a group pier.
~~(8)~~ **(9)** Be placed by or with the acquiescence of a riparian owner.

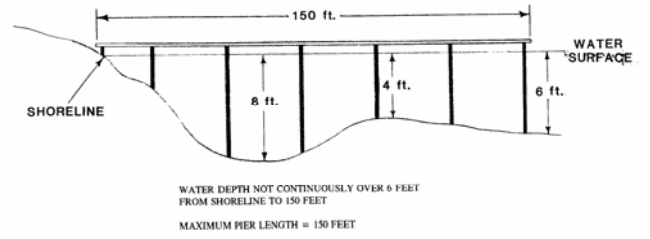
(c) Illustrations of maximum lengths for a pier or similar structure that may qualify under subsection (b) are as follows:



Where the water depth is six (6) feet or less from the shoreline to one hundred fifty (150) feet from the shoreline, the maximum pier length is one hundred fifty (150) feet.



Where the maximum water depth is continuously more than six (6) feet beyond seventy-five (75) feet from the shoreline, the maximum pier length is seventy-five (75) feet.



Where the maximum water depth is not continuously over six (6) feet from the shoreline, the maximum pier length is one hundred fifty (150) feet.

(d) In order for the placement, maintenance, and operation of a dry hydrant to qualify, the hydrant must satisfy each of the following:
(1) Be sponsored or owned by a volunteer or full-time fire department recognized by the public safety training institute.
(2) Be readily accessible from an all-weather road, public access site, or similar area.
(3) Have a diameter of at least six (6) inches.
(4) Be constructed of PVC pipe or a similar nontoxic material.

(5) Extend no more than one hundred fifty (150) feet from the waterline or shoreline.
(6) Have all portions of the hydrant and its in-lake accessories be at least five (5) feet below the legally established or average normal water level.
(7) Be marked with a danger buoy, which conforms to 312 IAC 5-4-6(a)(1), at the lakeward end of the hydrant.
(8) Be equipped with a screen or straining device on the lakeward end.
(9) Glacial stone or riprap only may be placed in or on the lakebed for either of the following:
(A) Bedding the intake pipe.
(B) Straining the intake water.
(10) Be approved by the riparian landowner.

(e) In order for the placement of glacial stone on the lakeward side of a seawall that is located within or along the waterline or shoreline of a public freshwater lake to qualify, the glacial stone reface must satisfy each of the following:
(1) The seawall reface must be comprised exclusively of glacial stone.
(2) The reface must not extend more than four (4) feet lakeward of the waterline or shoreline at the base of a lawful seawall.
(3) A walk or structural tie must not be constructed on the existing seawall in combination with the glacial stone reface.
(4) An impermeable material must not be placed behind or beneath the glacial stone reface.
(5) Filter cloth placed behind or beneath the glacial stone reface must be properly anchored to prevent displacement or flotation.
(6) Erosion from disturbed areas landward of the waterline or shoreline must be controlled to prevent its transport into the lake.

(Natural Resources Commission; 312 IAC 11-3-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2223; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1614; filed May 25, 2004, 8:45 a.m.: 27 IR 3062)